Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

In the Matter of	)	
	)	95-183
Amendment of the Commission's	)	ET Docket 95-~~185~~
Rules Regarding the 37.0-38.6	)	RM-8553
and 38.6-40.0 GHz Bands	)	
	)	
Implementation of Section 309(j)	)	PP Docket No. 93-253
of the Communications Act --	)	
Competitive Bidding	)	

COMMENTS OF
COLUMBIA MILLIMETER COMMUNICATIONS, L.P.

Jonathan D. Blake
Kurt A. Wimmer
Catherine J. Dargan

COVINGTON & BURLING
1201 Pennsylvania Avenue, N.W.
Post Office Box 7566
Washington, D.C. 20044
(202) 662-6000

Attorneys for Columbia Millimeter Communications, L.P.

March 4, 1996

SUMMARY

Columbia Millimeter Communications, L.P. ("Columbia") has committed substantial research and investment capital to explore new uses for the 37.0-38.6 GHz ("37 GHz") and 38.6-40.0 GHz ("39 GHz") bands. We are prepared to offer the public vibrant new services that will be highly competitive with local exchange monopolies and that will provide Americans with new flexibility for high-speed data and image transmission. This proceeding, if resolved properly, can hasten those services to market. On the other hand, this docket also has the potential to seriously disadvantage some licensees at the expense of others and thus skew the emerging marketplace for 38 GHz services.

These comments suggest ways in which the Commission can invigorate the marketplace for these new services without endangering full and fair competition by creating policies that limit the potential of this important new service or arbitrarily discriminate among licensees.

First, the Commission should permit applications that were not mutually exclusive as of the date of the Commission's *Notice* to be processed in the normal course. This action will not only be fair and correct the illegality of the Commission's retroactive freeze notice, but also will foster a competitive marketplace and ultimately increase auction revenues.

Second, the Commission should permit licensees to have maximum technical flexibility in deploying new services and create complete parity among licensees that may obtain their licenses at different times and through different licensing mechanisms.

Third, if the Commission determines it must impose build-out requirements (and we do not believe it must do so), these requirements must be fair, flexible and consistent with good, prudent business practices.

Finally, we generally agree with the Commission's goal of making more spectrum available to the public by means of auctions for licenses based on basic trading areas and simultaneous multiple-round bidding.

CONTENTS

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C.

In the Matter of	)	
	)	
Amendment of the Commission's	)	ET Docket 95-185
Rules Regarding the 37.0-38.6	)	RM-8553
and 38.6-40.0 GHz Bands	)	
	)	
Implementation of Section 309(j)	)	PP Docket No. 93-253
of the Communications Act --	)	
Competitive Bidding	)	

TO: The Commission

COMMENTS OF
COLUMBIA MILLIMETER COMMUNICATIONS, L.P.

Columbia Millimeter Communications, L.P. ("Columbia") has committed substantial research and investment capital to explore new uses for the 37.0-38.6 GHz ("37 GHz") and 38.6-40.0 GHz ("39 GHz") bands. We, and other licensees, are prepared to offer the public vibrant new services that will be highly competitive with local exchange monopolies and that will provide Americans with new flexibility for high-speed data and image transmission. This proceeding, if resolved properly, can hasten those services to market. On the other hand, this docket also has the potential to seriously disadvantage some licensees at the expense of others and thus skew the emerging marketplace for 38 GHz services.

These comments will suggest ways in which the Commission can invigorate the marketplace for these new services without endangering full and fair competition by creating policies that limit the potential of this important new service or arbitrarily discriminate among licensees. *First*, the Commission should permit applications that were not mutually exclusive

as of the date of the Commission's *Notice* to be processed in the normal course.[1] *Second*, the Commission should permit licensees to have maximum technical flexibility in deploying new services and create complete parity among licensees that may obtain their licenses at different times and through different licensing mechanisms. *Third*, if the Commission determines it must impose build-out requirements (and we do not believe it must do so), these requirements must be fair, flexible and consistent with good, prudent business practices. *Finally*, we generally agree with the Commission's goal of making more spectrum available to the public by means of auctions for basic trading area ("BTA")-size licenses and suggest ways in which the auctions should be structured.

I. INTRODUCTION

Columbia comes to this proceeding with a decade-long base of experience in launching new spectrum-based industries. Columbia is an affiliate of Columbia Capital Corporation, an entrepreneurial communications company whose principals have founded numerous industry-leading domestic and international ventures in cellular, personal communications services ("PCS"), enhanced specialized mobile radio, fixed wireless telephony, new media and other services. For the past two years, Columbia has focused its considerable energy exploring new services that can be provided using emerging technologies in the 37-40 GHz spectrum band.

Columbia has researched new point-to-point and point-to-multipoint technologies in this band and is preparing to launch commercial service in some 36 markets across the United States for which it has obtained licenses. To have a competitive and viable service that can attract the substantial financing necessary for a multiple-city build-out, however, Columbia must expand its potential service areas to create a nationwide business. It has pending

---

[1] We urge the Commission to resolve this threshold issue as quickly as possible, preferably in an order vacating the portion of its notice of proposed rule making and order that imposed a freeze on the processing of these applications. This order should be released as quickly as possible and certainly before a full First Report is adopted in this docket, a result that could be obtained by granting the petition for reconsideration and emergency request for stay filed by Commco, L.L.C.

applications that are not mutually exclusive and thus are ripe to be granted proposing to serve another 92 markets, the grant of which would permit Columbia expeditiously to launch a true nationwide high-speed data service.[2]

This service will not, as some believe, rely solely on providing simple "backhaul" services to connect base stations sites and switches for wireless carriers and point-of-presence links for competitive access providers. The market for these services is relatively finite and static, and entrenched telephone monopolies can lower fixed-service prices to make market entry difficult.

In contrast to this relatively straightforward market, the businesses for which licensees in the 39 GHz band now require spectrum will provide a new range of groundbreaking high-speed data and image transmission services to the public. In the first phase of this industry, Columbia anticipates providing "last mile" data service in direct competition with entrenched wireline carriers. These services can provide immediate and flexible access to high-speed and high-bandwidth data transmission in a manner that does not depend upon time-consuming and relatively permanent installation of wired facilities. Importantly, 39 GHz licensees can add substantial value over fixed wired installations by permitting greater flexibility and immediacy (and, in some cases, capacity) in structuring operations.

In the next and, to Columbia, more important phase of this industry's development, Columbia anticipates the development of technology which will allow Columbia to provide point-to-multipoint services that will permit businesses, individuals, public-safety agencies, hospitals and others to obtain immediate on-demand transmission services. These services will permit even greater flexibility and immediacy in transmitting two-way high-volume data,

---

[2] It likely will be necessary for Columbia to supplement and expand its service area as demand for 37 and 39 GHz services grows. We anticipate participating in auctions for additional licenses provided that the Commission's new rules permit the services envisaged by our business plan and we are able to begin a viable service based on our initial complement of licenses and pending applications.

voice, images and video in a manner that now is impossible employing either traditional wired solutions or point-to-point wireless initiatives. Although this technology is not yet ready for market, it is actively being developed today.

To permit these services to be provided expeditiously and to prevent manufacturers and others from abandoning this important phase of research, we urge the Commission in these comments to adopt rules that are flexible enough to encourage innovation in this spectrum band, as well as to structure a service that is characterized by parity among participants and a level playing field. Adoption of the principles Columbia advocates here will permit spectrum-based businesses to begin providing much-needed competitive broadband data services today.

This competition will create the incentive for bidders to value 37 GHz and 39 GHz highly when the Commission begins auctions. It is clear from the course of the PCS auctions that commercial launch of services can have a dramatic upward impact upon auction values. When the highly successful Block A and B auctions took place, no PCS operator had commenced service. Now, however, one PCS licensee has successfully launched a commercial service and two others have had successful initial public offerings. The Block C auctions, which still are underway, have substantially exceeded the prices bid for Block A & B PCS licenses -- even though bidding on Block C licenses is limited to entrepreneurial and small businesses. The same effect is likely in the 37-39 GHz context. The best way for the Commission to maximize auction revenues is to permit Columbia and other serious 39 GHz licensees to launch their businesses quickly, in accordance with the principles we urge in these comments.

II. THE COMMISSION SHOULD PERMIT NON-MUTUALLY EXCLUSIVE APPLICATIONS TO BE PROCESSED IMMEDIATELY.

Columbia urges the Commission to rescind that portion of its order in this proceeding that holds in abeyance all amendments to pending applications for 39 GHz licenses received on or after November 13, 1995, during the pendency of this proceeding (the "*Order*"). It should do so (A) because the *Order* is unwise and unfair and (B) because the *Order* likely is illegal and will entangle the Commission and the industry in protracted and unnecessary litigation.

A. The Commission's Decision To Freeze The Processing Of Applications That Are Ripe For Grant Is Bad Policy That Will Skew The Marketplace And Endanger Auction Revenues.

Our objections to the Commission's premature decision fall into two broad categories. First, as we discuss in greater detail below, the *Order* is beyond the Commission's authority and will entangle the agency and this industry in prolonged, expensive and entirely unnecessary litigation. Second and more compellingly, however, a decision to freeze in midstream the development of existing businesses that stand ready to provide highly demanded services to the public is simply irresponsible regulatory policy.

As the Commission knows, some 39 GHz licensees have obtained sufficient licenses, through applications and acquisitions, to begin a nationwide service. Others are a step -- but only a step -- behind. The Commission's decision, which was based on no record evidence whatsoever (and, predictably, suffers from the obvious defects of incomplete information),[3]

---

[3] The most obvious evidence that the *Order* was based on incomplete and erroneous non-record misinformation is in its mistaken conclusion that a number of 39 GHz applications were submitted in speculation by entities looking for windfall profits in an auction "after market." *Order* at ¶ 7. This is most assuredly not the case for the vast majority of 39 Ghz applicants (including, of course, Columbia). Notably and correctly, several Commissioners expressed their disbelief that applicants for the 39 GHz band were largely speculators. *See* Separate Statement of Commissioner Chong ("I am not persuaded that granting these applications would create incentives for speculation," noting that a large number of 39 GHz applications were filed by entities with "significant resources and

will skew the marketplace over the long term by ensuring that a small number of companies will have a federally mandated period when they will be protected from competition from other 39 GHz licensees. If at least pending applications that are not mutually exclusive can be processed, however, Columbia and others will have sufficient critical mass to create competitive spectrum-based businesses immediately.

This more competitive market will speed service to the public and create an incentive for other businesses to bid for 37 GHz licenses (and create a strong base of companies that will have strong incentives to bid for remaining 39 GHz licenses). Stopping these new competitors in their tracks while permitting a few to move ahead, however, constitutes blatant "picking of winners" by a regulatory agency and will stunt the development of a vibrant new industry for years to come.

B. The Freeze On Processing Non-Mutually Exclusive Applications That Are Ripe For Grant Is Illegal On Numerous Grounds.

In addition to being unwise and unfair, the *Order*, which effectively freezes the processing of all amendments to mutually exclusive applications, violates the statutory authority granted to the Commission by Congress under its provisions regarding competitive bidding. The *Order* also violates the Commission's own rules and is an impermissible retroactive rulemaking. Finally, the *39 GHz Order* fails to adequately articulate a reasoned basis in support of the freeze.

---

communications experience"). Commissioner Chong also notes that there is no indication of speculation in these applications of the type that the Commission has seen in some other areas. *Id.*; *see also* Separate Statement of Commissioner Barrett ("[W]hile some would have us believe that a great deal of these applications may be from speculators, I continue in my belief that the government should not prejudge any applicant's intention with respect to the provision of service. Again, I emphasize that not every applicant that does not acquire a license through the competitive bidding process should be deemed suspect"). To the extent that speculation does exist, it would be better addressed by FCC enforcement of real-party-in-interest and other rules rather than by adopting an overall licensing scheme that threatens to skew the marketplace and undermine services that are planned by legitimate operators such as Columbia.

1. The *Order*'s Freeze on Processing Pending Amendments to Mutually Exclusive Applications for 39 GHz Licenses Exceeds the Commission's Authority Under the Communications Act.

Section 309(j)(6)(E) of the Communications Act of 1934 clearly obligates the Commission to "use engineering solutions, negotiation, threshold qualifications, service regulations, and other means in order to avoid mutual exclusivity and application and licensing proceedings." 47 U.S.C. § 309(j)(6)(E). The Act also limits the considerations that the Commission may take into account when assigning a band of frequencies to a use for which licenses or permits will be issued. The Act prohibits the Commission from basing a finding of public interest, convenience, and necessity "on the expectation of federal revenues from the use of a system of competitive bidding." 47 U.S.C § 309(j)(7)(B). In this proceeding, however, the *Order* requires the Commission to do just that. The *Order* proposes that the Commission employ the same auction procedures for the 39 GHz band as are proposed for the 37 GHz band. *Order* at ¶ 104.

Although Congress has expressly indicated that it prefers that parties resolve mutual exclusivity in these licensing proceedings, and many parties -- including Columbia -- have gone to extraordinary lengths to do so, the *Order* improperly and unwisely stymies that process. Additionally, the *Order*, in opposition to Congress' explicit intent, clearly and obviously interjects an auction interest into the consideration of the method of dispensing these licenses.

2. The Freeze on Amendment Processing for 39 GHz License Applications Contravenes the Commission's Own Rules.

The Commission's rules regarding amendments of applications allow for an applicant to amend as a matter of right before the application has been designated for hearing, comparative evaluation, or random selection. 47 C.F.R. § 21.23(a)(1). The rules explicitly encourage the filing of amendments which resolve frequency conflicts "with authorized

stations or other pending applications." 47 C.F.R. § 21.31(e)(2). Such amendments are favored because resolution of pending applications, absent the amendments, would otherwise require a hearing, comparative evaluation, or random selection. *Id.* The amendments, therefore, conserve valuable Commission resources and expedite service to the public.

As evidence of the Commission's traditional preference for resolution of mutually exclusive applications with minimal Commission involvement, 47 C.F.R. § 21.29(b)(1) provides that agreements or understandings which resolve frequency conflicts by amending or dismissing applications need not secure prior Commission approval. Similarly, another rule requires that "[a]ll applicants and licensees shall cooperate fully and make reasonable efforts to resolve technical problems and conflicts that may inhibit the most effective and efficient use of the radio spectrum . . . ." 47 C.F.R. § 21.100(d)(1). Thus, the Commission's own rules strongly promote the resolution of mutually exclusive applications independent of its involvement.

3. The Postponement of Processing Amendments to 39 GHz License Applications Is An Impermissible Retroactive Rulemaking.

The *Order*, adopted on December 15, 1995, bars the processing of any pending 39 GHz applications that are subject to mutual exclusivity as of November 13, 1995. The order also barred the processing of any amendments filed on or after November 13, 1995. *Order* at ¶ 123-124. Thus, 39 GHz license applicants learned for the very first time -- at least one month after processing of the amendments was suspended -- that action would not be taken on their mutually exclusive applications pending an auction proceeding. The freeze implemented by the *Order* constitutes an attempt at impermissible retroactive rulemaking.

Retroactive rulemaking, when an agency action "alters the past legal consequences of past actions" or "change[s] what the law was in the past" is inherently suspect. *Bowen* v. *Georgetown University Hospital*, 488 U.S. 204, 208 (1988). This presumption against retroactive legislation is deeply rooted in American jurisprudence. *Kaiser Aluminum &*

Chemical Corp. v. *Bonjourno*, 494 U.S. 827, 842-44, 855-56 (1990) (Scalia, J., concurring). Retroactive rulemaking is prohibited unless Congress expressly grants that authority to the agency. *Motion Picture Ass'n of America, Inc.* v. *Oman*, 969 F.2d 1154, 1156 (D.C. Cir. 1992).

Retroactive legislation poses serious unfairness problems because "it can deprive citizens of legitimate expectations and upset federal transactions." *General Motors Corp.* v. *Romein*, 503 U.S. 181, 191 (1992); *Landgraf* v. *USI Film Products*, 114 S. Ct. 1483, 1497 (1994) ("Elementary considerations of fairness dictate that individuals should have an opportunity to know what the law is and to conform their conduct accordingly; federal expectations should not be lightly disrupted") (footnote omitted).

Due process concerns require that retroactive application of legislation is itself justified by a rational legislative purpose. *United States* v. *Sperry Corp.*, 493 U.S. 52, 64 (1989) (*citing Pension Benefit Guaranty Corp.* v. *R.A. Gray & Co.*, 467 U.S. 717, 730 (1984)). In other words, the test is whether the retroactive application of the freeze on applications, and amendments thereto, furthers a legitimate legislative purpose.

In this case, the Commission acted wholly without explicit legislative support for its retroactive application of a new rule; in fact, this particular action ignored clear and explicit Congressional mandates against a retroactive freeze of non-mutually exclusive applications. As noted earlier, both the Communications Act of 1934 and the Commission's own regulations encourage the avoidance of mutual exclusivity in license applications. Had the freeze on processing amendments not been imposed retroactively, hundreds of incidents of mutual exclusivity could have been avoided. Instead of furthering a legitimate legislative purpose, the retroactive freeze on the processing of those amendments that were submitted before December 15, 1995 *defeats* a legitimate legislative purpose.

An express provision of the Communications Act of 1934 forbids the Commission from basing its licensing decisions on the expectation of generating federal revenue through

the use of auctions. *See* 47 U.S.C. § 309(j)(7)(B). Thus, the desire to auction off licenses to increase federal coffers is not a rational legislative purpose for the retroactive freeze.

Applicants for the 39 GHz licenses have had their rights under the Commission's own rules altered as of November 13, 1995, although they were not provided notice of this modification until at least December 15, 1995. Amendments submitted prior to December 15, 1995, should be processed to avoid impermissible retroactive rule making.[4]

4. The *Order* Fails to Adequately Articulate a Reasoned Basis In Support of the Freeze.

It is well settled in administrative law that agencies are required to articulate the basis of their decisions with simplicity and clearness. *Melody Music, Inc.* v. *Federal Communications Comm'n*, 345 F.2d 730, 733 (D.C. Cir. 1965). Specifically, an agency must provide some factual and evidentiary support for the promulgation of a rule.[5] To withstand judicial scrutiny, an agency must provide a reasoned explanation for its action, and the record must not disprove the agency's conclusion. *Petroleum Communications, Inc.* v. *Federal Communications Comm'n*, 22 F.3d 1164, 1172 (D.C. Cir. 1994) (citing *American Tel. & Tel. Co.* v. *Federal Communications Comm'n*, 974 F.2d 1351, 1354 (D.C. Cir. 1992)).

The *Order* contends that two reasons justified the freeze. First, "resolving mutually exclusive applications requires greater expenditure of Commission resources than processing

---

[4] We would not disagree with an approach that permits applications that were filed after December 15, 1996 to be processed as well, but only point out here that it is clear that it would constitute impermissible retroactive rulemaking and be unfair in the extreme for the Commission to set a retroactive date for the freeze on processing to commence.

[5] *Motor Vehicle Manufacturers Ass'n* v. *State Farm Mutual Insurance Co.*, 463 U.S. 29, 43 (1983) ("[A]n agency rule would be arbitrary and capricious if the agency . . . offered an explanation for its decision that runs counter to the evidence before the agency"). Accordingly, an agency must cogently explain why it has exercised its discretion in a particular matter. *Id.* at 48. The Commission is free to change its standards in a procedural rulemaking "as long as it provides a reasoned explanation for doing so." *Committee for Effective Cellular Rules* v. *Federal Communications Comm'n*, 53 F.3d 1309, 1317 (D.C. Cir. 1995) (*citing Florida Cellular Mobil Communications Corp.* v. *Federal Communications Comm'n.*, 28 F.3d 191, 196-97 (D.C. Cir. 1994), *cert. denied*, 115 S. Ct. 1357 (1995)).

uncontested applications." *39 GHz Order* at ¶123. Second, the Commission was concerned that "attempting to award licenses in mutually exclusive situations under our current rules could lead to results that are inconsistent with the objectives of this proceeding." *Id.* The first proffered reason -- concern about the expense of processing mutually exclusive applications -- would be alleviated entirely by the processing of amendments that were filed before December 15, 1995 which would have resolved many contested applications. The second proffered reason is somewhat vague, but appears to express a desire to pursue competitive bidding in an effort to resolve mutual exclusivity. Not only will the amendments further such resolution, but the governing statute explicitly prevents the Commission from altering its procedures merely to seek greater federal revenues. Hence, the proffered reasons for the freeze do not articulate a "rational connection between the facts found and the choice made" by the Commission. *Cincinnati Bell Telephone Co. v. Federal Communications Comm'n*, 69 F.3d 752 (6th Cir. 1995).

* * *

Although many 39 GHz license applicants already have negotiated the resolution of hundreds of frequency conflicts without creating any new or additional conflicts and without expending any Commission resources, these efforts are rendered useless by the *Order*. Consequently, the Commission will not avoid mutual exclusivity in the applications for the 39 GHz licenses. In fact, the *Order* forces the Commission to forsake its obligations under §§ 309(j)(6)(e) and 309(j)(7)(b) of the Communications Act and under its own rules to avoid mutual exclusivity.

In the expectation of soliciting greater federal revenue, the *39 GHz Order* forecloses this opportunity to resolve applications and unnecessarily squanders Commission resources in formulating a new method of resolving them. The worst aspect of this policy, even above its elementary unfairness to those who have relied in good faith

on the Commission's existing rules, is that it will actually delay the implementation of competitive new services to the public. The Commission should lift the stay immediately.

III. THE COMMISSION SHOULD NOT IMPOSE HEAVY-HANDED REGULATORY RESTRICTIONS THAT WILL SKEW THE MARKETPLACE AND ENDANGER FAIR COMPETITION.

Columbia urges the Commission to adopt a two-pronged policy of flexibility and parity in establishing rules to govern this service. *Flexibility*, first and foremost, should be the watchword in determining how licensees should be permitted to utilize the spectrum represented by their licenses -- just as the Commission has recognized in other proceedings, less regulation permits more service to the public. *Parity*, as a corollary goal, is crucial in creating a level playing field among all 37 and 39 GHz licensees, regardless of whether they have acquired licenses by auction or non-auction processes. We discuss these concepts more specifically below.

A. The Commission Should Permit Maximum Flexibility for Spectrum Use In The 37 and 39 GHz Services.

The Commission historically has micromanaged spectrum-based businesses, establishing by government regulation the specific parameters in which technologies can be deployed. Establishing and updating these parameters can take months and even years, during which public demand for new technology remains unmet.[6] More recently, however, the Commission properly has determined that this policy is poor regulatory management -- no agency could hope to keep pace with fast-breaking developments in communications technology and service. This trend toward spectrum flexibility is one of the great achievements of the current Commission and is perhaps the single most

---

[6] The cost of regulatory delay in establishing the cellular service, for example, now is well established. *See* J.H. Rohlfs, C.L. Jackson, & T.E. Kelly, *Estimate of the Loss to the United States Caused by the FCC's Delay in Licensing Cellular Telecommunications* (National Economic Research Associates, 1991) (finding that the delay in licensing cellular cost the U.S. economy $86 billion).

important development of the decade in encouraging innovation and imaginative service to the public.

In establishing personal communications services, for example, the Commission declined to establish a technical straitjacket for licensees (as it had earlier done with cellular). In deciding to permit licensees to deploy any sort of digital technology that did not interfere with other PCS licensees and incumbent microwave users, the Commission created a service in which licensees can respond quickly and creatively to market demand. The Commission has adopted this approach in other services as well.

The single best example of this trend is the Commission's decision to establish a general wireless communications service ("GWCS") in the 4660-4685 GHz band. In that proceeding, the Commission determined not to establish service-specific rules at all, but simply to mandate that licensees protect others from harmful interference.[7] This is a particularly sensible approach and one that should be followed here. The intensely regulatory service rules of the past were, in fact, simply attempts to prevent interference and encourage spectrum efficiency. In today's marketplace, innovative engineering solutions are available to accomplish both goals and licensees will be inherently highly motivated to meet these challenges without the imposition of government rules that would handicap the very licensees that wish to bring the most innovative services to market most quickly.

To accomplish this goal in this docket, the Commission should establish one single overriding principal for technical operation in the 37 and 39 GHz bands -- licensees must protect others (specifically, other licensees at border areas and adjacent channel licensees) from interference. The Commission recognizes this reality by stating that "only those technical rules required to minimize interference between channel blocks and between

---

[7] *See* Allocation of Spectrum Below 5 GHz Transferred from Federal Government Use, 4660-4685 MHz, Second Report & Order, 60 Fed. Reg. 40712 (ET Docket 94-32, Aug. 9, 1995).

service areas are needed" (p. 55). But the technical rules that the Commission proposes are far more intrusive than necessary.

The Commission should adopt its proposal to establish an effective isotropic radiated power limit of 55 dBW (*Notice*, p. 56). The remainder of the Commission's proposals (and the recommendations of TIA on which they are based) are simply unnecessary. Worse, these proposals could affirmative cause harm by preventing licensees from having the flexibility to provide immediate and innovative service to the public. In particular, highly demanded point-to-multipoint services would be impossible under the Commission's current proposals. If adopted, these proposals would result in creating a regulatory scheme in which licensees would rely more on lawyers seeking repeated waivers to permit flexibility in serving the public than on engineers and businesspeople seeking to expand consumer choice.

Specifically, the Commission's proposal to require certain categories of antenna use, establish frequency tolerance limitations, and require certain emission masks should not be adopted. These proposals would limit future development to current standards and decrease the ultimate value of the 37-39 GHz service to consumers, licensees and potential bidders. It is instructive, and not surprising, that the best support the Commission can give to these proposals is the statement that they are "well within the current state of the art for these frequencies" (p. 55). While this may be true, the Commission must recognize that "state of the art" is an inherently transitory condition -- the "current" state of the art will be exceeded relatively quickly as new equipment is created and will be trumped repeatedly as the cycle of innovation continues apace.

For example, placing a highly specific (three degree) limitation on beamwidth completely prevents emerging point-to-multipoint operations, the very application of this service that Columbia believes will be most highly demanded (and the very application we have expended significant efforts and funds in exploring). Freezing technical

developments in this band to the proposed 1995 specifications would create a less innovative service that would be at least partially obsolete before it begins; it would ensure slower and less useful service to American consumers; and it would produce much less potential auction revenue for the Treasury.

In contrast, if the Commission permits spectrum flexibility in this docket comparable to that permitted in GWCS, it will have taken an important step toward encouraging innovation. It is true, of course, that micromanaging technical specifications (as TIA proposes) makes efficiency and interference protection more certain, but this certainty comes at a great cost. The life-blood of licensees is their need to operate efficiently and without interference; the industry and the marketplace will accommodate this need without the need for prolonged and intrusive federal regulation. Licensees complying with the minimally intrusive EIRP limitation proposed by the Commission will easily and efficiently coordinate boundary issues and adjacent-channel issues -- in fact, licensees with mutual interests in solving any issues that may arise typically can resolve these issues more creatively and quickly if greater flexibility is available to them. And most importantly, innovative new services will be produced and brought to market without the need for continuing Commission involvement.

B. The Commission Should Treat The 37 GHz and 39 GHz Bands Identically And Should Not Discriminate Among Old And New Licensees.

There is a single distinction between the 37 and 39 GHz bands -- in the 39 GHz band, there have been licenses granted and there are applications pending. That is all. No one would claim that the 37 and 39 GHz bands are subject to any reasoned technical, engineering or business distinction. In fact, the 37-40 GHz band is a single band. In light of this essential symmetry, it would be entirely arbitrary to impose artificial regulatory distinctions on a certain class of licensees while permitting future licensees greater flexibility and freedom to serve the marketplace. As the Commission recently has noted,

creating a single set of regulatory requirements for similarly situated microwave licensees "will result in significant benefits for the public and the Commission."[8] The same is true in this docket.

Accordingly, Columbia urges the Commission to be guided by the principal of parity among competing licensees in establishing service rules for the 37-40 GHz band. It should bear in mind that it is creating an industry, not merely a set of rules -- if it handicaps some licensees at the expense of others, it will create competitive inequities that will exist for years to come. The mere threat of imbalanced rules may chill innovation and research-and-development activities which, if begun now, would improve the value and utility of the entire 37-40 GHz band. This competitive imbalance would unfairly disadvantage the very pioneers that have created the demand for new licenses and will harm consumers by diminishing the opportunity for spirited competition among similarly situated licensees. Specifically:

- The Commission's proposal to require only 39 GHz licensees to utilize only Category A antennas is entirely arbitrary. This proposal, if adopted, would have the perhaps unintended consequence of preventing 39 GHz licensees from pursuing an entire line of business -- in Columbia's case, the precise line of business that we believe is most highly demanded, most unique, and most promising. There is no reasoned basis for this intrusive restriction, and it should not be adopted.
- Proposing to require that only existing 39 GHz licensees, and not auction licensees, obtain a minimum digital efficiency of 1 bps/Hz is, again, a classic case of regulatory imbalance without any reasoned basis. Licensees

---

[8] Reorganization and Revisions of Parts 1, 2, 21, and 94 of the Rules to Establish a New Part 101 Governing Terrestrial Microwave Fixed Radio Services, Report & Order, slip op. at 3 (WT Docket 94-148, February 29, 1996).

will be motivated to use spectrum efficiently without intrusive regulatory requirements.

- The Commission should not adopt its proposal to "strengthen" or "codify" the supposed "policy guidance" with which 39 GHz licensees have been required to comply since the Common Carrier Bureau's September 16, 1994 "policy statement." Burdening only 39 GHz licensees with a series of showings that have no relation to the actual and current business plans of licensees serves no purpose other than to provide competitors with a convenient mechanism for learning their opponents' proposals.

IV. BUILD-OUT REQUIREMENTS ARE UNNECESSARY, BUT, IF ADOPTED, SHOULD BE MADE FLEXIBLE.

The Commission's proposal to impose strict (in fact, punitive) build-out requirements on non-auctioned 39 GHz licensees only is unnecessary, arbitrary and ignores the reality of the 37-40 GHz business. Current licensees -- which, like Columbia, obtained their licenses through the painstaking, time-consuming and expensive process of ensuring that applications are not mutually exclusive -- will be highly motivated by public demand to build out systems to provide valuable services to the public.

We submit that the *Notice*'s proposal to impose build-out requirements only on licensees that did not obtain licenses at auction is precisely backward. Build-out requirements are imposed to prevent spectrum warehousing. Companies that engage in spectrum warehousing generally are larger, incumbent entities that already have operations in the markets in question and wish to "warehouse" spectrum to prevent new entrants from having access to it. That concern has no applicability to current 39 GHz licensees -- virtually to a company, these licensees are new entrants rather than incumbents.[9] In fact,

---

[9] There are, of course, a few CMRS companies that have acquired 39 GHz licenses for use in cellular and PCS backhaul. The Commission obviously need not be concerned about the warehousing of spectrum that has been obtained for internal company support systems.

they generally are upstart, entrepreneurial companies that wish to compete against much more powerful telephone companies. To these entrepreneurs, Columbia included, spectrum is useless when it is not used. Warehousing is anathema to the very essence of new entrants, which must use spectrum to compete if they wish to have a viable business.

The greater concern will be what happens at auction when the more powerful marketplace incumbents begin bidding. It is much more likely that auction winners -- particularly if they are in-region landline telephone companies -- would have a direct incentive to warehouse 37-40 GHz spectrum to prevent new entrants from obtaining it and challenging them in the marketplace. Accordingly, if the Commission is legitimately concerned about "warehousing," it should focus its attention on auction winners rather than on current 39 GHz licensees.[10]

But we do not believe the Commission must impose build-out requirements on either current licensees or future auction winners to accomplish its goals. Imposing artificial build-out requirements would not serve the Commission's stated goals; in fact, it would have precisely the opposite effect. Requiring licensees to demonstrate service to an arbitrary number of sites in a particular geographic area will force licensees to build simple, point-to-point links -- regardless of whether the marketplace demands that particular genre of 37-40 GHz service. In fact, there is a family of services that will be provided by 37-40 GHz licenses; some will offer simple point-to-point links, and others may not. The Commission's proposed build-out requirements will force, however, all licensees to expend precious funds wastefully in furtherance of a supposed "build out" that would be accomplished for no reason other than to satisfy the Commission. It is difficult

---

[10] In fact, the backward nature of the *Notice*'s concern on this point might lead a cynic to believe that the Commission intended to use build-out requirements inappropriately to produce defaults in an effort to obtain additional licenses to auction.

to conceive a more wasteful and old-style regulation that would be more out-of-place in an era when regulation should match marketplace realities rather than ignore them.

If, however, the Commission does impose build-out requirements, it should provide for the same sort of test that it has approved for certain PCS applications. In recognition of the fact that some PCS licensees on 10 MHz spectrum blocks D, E and F may provide niche services rather than mass-market services, the Commission has permitted these licensees to avoid population-based build-out requirements to "make a showing of substantial service in their licensed area." 47 C.F.R. § 24.203(b) (1995). An identical rule would be appropriate here, where some 37-40 GHz licensees will be utilizing new technologies that may be square pegs if forced in the round hole of a simple "links per square kilometer" standard. Under this test, if licensees cannot make a showing "of substantial service in their licensed area" at a five-year benchmark, they would be subject to possible forfeiture or non-renewal of their license. This requirement would provide sufficient regulatory pressure to ensure that spectrum will not be warehoused (a consequence that we believe would be most unlikely at any rate).

V. THE COMMISSION SHOULD AUCTION NEW SPECTRUM IN A MANNER THAT INCREASES THE POTENTIAL FOR CREATION OF A COMPETITIVE NEW INDUSTRY.

Columbia agrees with the Commission's essential auction plan and its two most important components -- the use of basic trading areas ("BTAs") and a PCS-like system of simultaneous, multiple-round bidding. We assume that the Commission will adopt rules that will fully protect the rectangular service areas of existing 39 GHz licensees when surrounding areas are auctioned. This result would be consistent with the procedures employed in multipoint distribution service auctions, which presented similar issues of incumbency. More importantly, it would be the only fair accommodation of the interests of new bidders with those of existing 39 GHz licensees, which have taken substantial risks

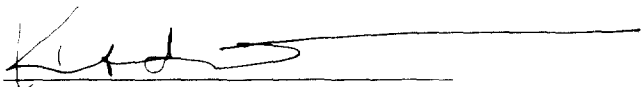
and gone to substantial effort and expense to build their businesses in reliance on the scope of their licenses.

* * *

For the reasons set out above, we urge the Commission to quickly vacate its freeze order and structure 37-40 GHz rules in a way that permits all competitors to serve the public expeditiously and effectively.

Respectfully submitted,

COLUMBIA MILLIMETER
COMMUNICATIONS, L.P.

By: 

Jonathan D. Blake
Kurt A. Wimmer
Catherine J. Dargan

COVINGTON & BURLING
1201 Pennsylvania Avenue, N.W.
Post Office Box 7566
Washington, D.C. 20044
(202) 662-6000

Its Attorneys

March 4, 1996